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IRRESPONSIBILITY CLAUSE IN AIR TRAFFIC CONTRACTS.

By Porquet.

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The question of the responsibility of the carrier in air traffic owes its importance to its reaction on insurance rates, which are nearly prohibitive in France. The effect of this situation is to favor the operations of English companies in our country. Hence, there is occasion for examining this question in order to find whether it is possible to remedy this state of affairs.

As regards passengers, the law is contained in articles 1382 and the following of the civil code. The passenger or his heirs must, in order to obtain damages, prove the fault of the company or its employes. Such is at least the jurisprudence of the "Cour de Cassation."

For freight, the question is much more complex. Articles 103-108 of the "Code de Commerce" govern transportation contracts: The text of Art. 103 establishes the responsibility of the carrier, aside from acts of Providence and inherent defects. In any case, previous to 1905, the same jurisprudence admitted the validity of an irresponsibility clause. In this case the carrier was assumed to be free from blame and the burden of proof lay with the shipper. In 1905, the importance attained by railroad companies and their monopoly in matters of transportation lead the legislature to protect individuals obliged to pass under the Caudine forks of these powerful organizations and decided that the clause exonerating the carrier from all responsibility was

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null and void. Such is the law of March 17, 1905, which adds to Art. 103 a third paragraph conceived as follows: "Every contrary clause inserted in any transportation contract, tariff schedule or other document is null." The carrier will henceforth be considered at fault and the burden of proof will, in every instance, devolve upon him.

Is this law (which is a veritable law of exception, since it limits the liberty of contracts, a principle of common law) of a public nature and does it apply to all transportation in general or only to land transportation? Such is the object of the discussion we have undertaken.

Let us remark, in the first place, that maritime transportation is governed by special laws, dating from Colbert and forming book II of the present "Code de Commerce." In the terms of this legislation (Art. 398 of the "Code de Commerce"), the irresponsibility clause is considered valid in maritime transportation contracts. It is therefore not of a public nature.

Does paragraph 3, of Art. 103, apply to land transportation alone? As we have seen, this paragraph was suggested by the importance attained by railroad companies and, in fact, during the discussion, no mention was made of anything but railroad companies.

It seems, however, that the legislature wished to make a general law, applicable to all transportation. In fact, Legrand and De Cuverville proposed an amendment specifying that the provisions of the bill under discussion should apply only to railroad

companies, which amendment was rejected. Moreover, in the senate, the chairman, Mr. Tillaye, regretted that since Art. 103 did not govern military transportation, the new paragraph could not apply to it.

We are therefore forced to conclude that the intention of the legislature was to make a general transportation law, applicable to all but maritime transportation.

In 1905, however, there was no aerial transportation and its possibility was not even suspected. The legislature evidently thought that, aside from maritime transportation, it was providing for all transportation, when it provided for land transportation. It did not conceive that there could be any other. It seems therefore, that the law of 1905 should apply only to land transportation. Moreover, by the very fact that it is contrary to the common law, its application must be strictly limitative and cannot be extended beyond the intentions of the lesislature

This extension, debatable from a juridical point of view, would be troublesome in its consequences. It is of national interest for aerial navigation enterprises to become rapidly prosperous and strong, but to apply Art. 103 to them would have the effect of imposing the prohibitive insurance tariffs on them. Let us rather facilitate the lowering of these tariffs, by informing the insurance companies that the burden of proof will always devolve on the shipper through the validity of an irresponsibility clause. Under these conditions, it may be objected, it

will be very difficult for the shipper to prove the fault of the carrier. Is it not the same in maritime matters? The law, however, considering the special risks incurred in this case, has felt itself bound to be more liberal than in land matters. The conditions of aerial navigation are at least as hazardous as those of maritime navigation and it would not seem logical to be more strict with the former than with the latter.

Furthermore, the people who patronize the aerial companies are not unaware of the risk inherent in this form of transportation and readily accept the irresponsibility clause, which, in fact, the companies now insert in their transportation contracts. It is therefore important that for a long time no doubt should exist regarding the validity of this clause, so that the insurance companies may lower their rates in all security.

We are confident that our argument will be confirmed by the jurisprudence, but the latter cannot be definitely established for some time and it is necessary for this uncertainty to cease. The Secretary of Aeronautics and Aerial transportation understands this and has prepared a bill adding a fourth paragraph to Art. 103, thus conceived: "Paragraph 3 above does not apply to air traffic." This bill will undoubtedly be approved by Parliament and will soon definitely settle the question.

Translated by the National Advisory Committee for Aeronautics.